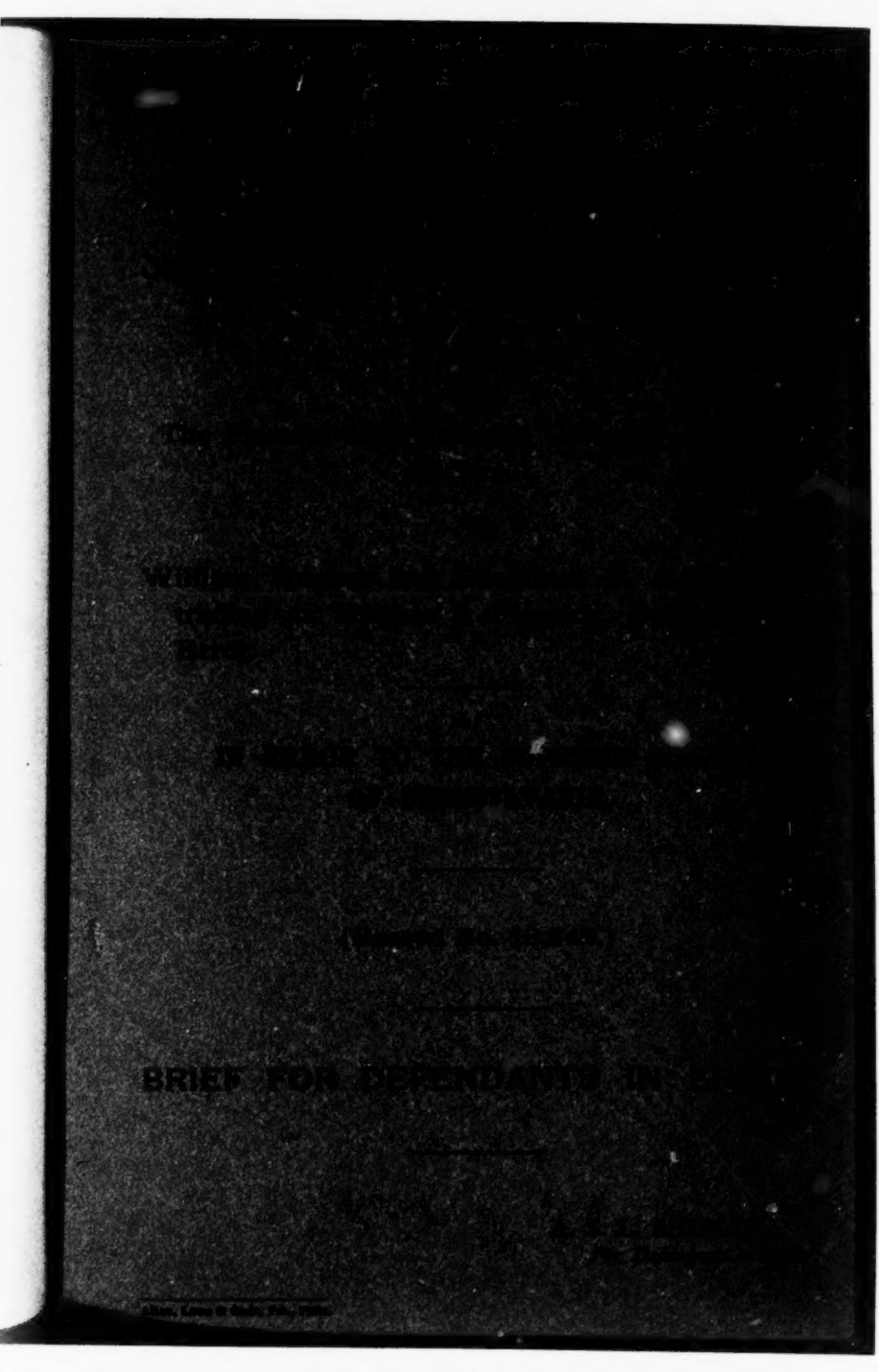

IN THE SUPREME COURT OF THE UNITED STATES.

The Pennsylvania Railroad Company, Plaintiff in Error,

vs.

William Hughes and Benjamin T. A. Fleming, trading as Hughes & Fleming, Defendants in Error.

October Term, 1903.

No. 56.

IN ERROR TO THE SUPREME COURT OF PENNSYLVANIA.

BRIEF FOR DEFENDANTS IN ERROR.

I. THE SUPREME COURT OF THE UNITED STATES HAS NO JURISDICTION TO REVIEW THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA IN THIS CASE.

The number of assignments of error in this case has been growing in a sort of geometrical progression. In the Court of Common Pleas, No. 2, for the county of Philadelphia, where the case was originally tried, two errors only were alleged, and two errors only were certified by his Honor, JUDGE SULZBERGER, who presided at the trial. Both of these alleged errors consisted of refusals to charge the jury as requested by the counsel for defendants (plaintiffs in error here), as follows:—

> "That it was lawful in the State of New York for the carrier to limit its liability by a special contract for an injury resulting from its negligence; that said contract having been for a through consignment

from Albany to Cynwyd, a place within this State, said contract must be considered in its entirety, and is incapable of divisibility; that said contract having stipulated for an agreed valuation of the stock shipped, the parties must be governed by its terms throughout the entire route, as said contract must be interpreted and enforced here by the law of the place where it was made, and within which State it is partly performed; and that consequently the plaintiff is not entitled to recover in excess of the valuation agreed upon by the parties at the time of shipment."

(Specification of error No. 1.)

"That the plaintiff is not entitled to recover in excess of $100."

(Specification of error No. 2.)

It will be noticed that not one word in either of these two points for charge mentions directly or indirectly, even in the most indefinite way, either the Constitution of the United States or the laws or treaties of the United States or the validity of any of the latter; nor did either of them specially set up or claim any title, right, privilege, or immunity under the Constitution of the United States or under any treaty, statute, commission, or authority thereof.

When we find these two specifications of error in the paper book of the appellant in the Supreme Court of Pennsylvania (pages XII. and XIII.) we discover that they have become three. The third specification is entirely new, and is in these words:—

"The learned court below erred in entering judgment in conflict with the Act of Congress of February 4th, 1887, entitled 'An Act to regulate commerce.' Section 1 of said Act clearly provides that where the transportation is from one State to another, under a through bill of lading, that its provisions

shall be carried out unless it be in conflict with a statute of the State in which it may be performed or in conflict with the policy of the United States as laid down in the Federal courts, and that as the contract was valid in the place where made, and as there is no statute in Pennsylvania prohibitory of an agreed valuation to establish a rate, and as it is consistent with the policy of the United States as declared by the Federal courts, the judgment should have been for the valuation mentioned in the contract."

The Supreme Court of Pennsylvania, by MR. JUSTICE POTTER, say in reference to this third point, on page 229 of the report of the case in that court, to be found in 202 Pennsylvania State Reports, page 222:—

"The third assignment of error suggests that the entry of judgment is in conflict with the Interstate Commerce Act of Congress. This seems to be an afterthought, as there is no indication in the record that this question was raised or considered in the court below. It is not apparent how the Act can have any application to this case. It contains nothing bearing on the validity of this contract limiting the liability of a railroad for loss or injury caused by negligence. The object of the Act seems to be to secure continuous carriage and uniform rates, and to compel the furnishing equal facilities. We cannot see that the entry of judgment in this case interferes in any way with the legitimate exercise of interstate commerce."

When the two original specifications of error reach this court, by some occult principle of multiplication they have further grown to nine, and we find that a rather ungenerous use has been made of JUSTICE POTTER's courteous declination to consider the supposed Federal question, by which it is made to appear that it was really considered and ruled upon.

For the Supreme Court of Pennsylvania to have done this in the face of their well-settled rule to the contrary as to exceptions not raised in the trial court would have been to overthrow a long line of consistent decisions of that court, of which it is only necessary to call the attention of this court to

Walls *vs.* Campbell (1889), 125 Pa., 346;
Hartley *vs.* Decker (1879), 89 Pa., 470;
Bank *vs.* Schuylkill Co. (1899), 190 Pa., 188.

It will thus be seen that it was entirely a matter of grace on the part of the Supreme Court of Pennsylvania to do any more than entirely ignore the third assignment of error raised in that court, and it is submitted that the attempt on the part of these plaintiffs in error to magnify the brief words of a further allusion to it in JUSTICE POTTER'S opinion into a formal consideration of it is an obvious effort to secure a precarious foothold of jurisdiction in this court at all hazards and at the expense of any inconsistency.

Passing by, for the present, however, the obvious imperfections of form and irregularity of presentment in these specifications of error, let us consider whether they present such a Federal question as will be considered by this court to give jurisdiction.

As has been held in a long line of decisions, the jurisdiction of this court to review the judgment of the highest court of a State is purely statutory, and will in all cases be strictly confined to questions arising under the provisions of section 709 of the Revised Statutes of the United States.

In Beals *vs.* Cone (1902), 188 U. S., 184, which was a mining suit brought under authority of sections 2325 and 2326, Revised Statutes United States, in the county court of El Paso, Col., to contest the right of the defendants to a patent for a mining claim, this court, speaking by MR. JUSTICE BREWER, said, on page 186:—

> "The jurisdiction of this court is denied. The validity of a treaty or statute of or authority ex-

ercised under the United States was not drawn in question in the State courts, nor was the validity of a statute of or authority exercised under the State of Colorado challenged on the ground of being repugnant to the Constitution, treaties or laws of the United States. So that the jurisdiction of this court depends on whether some title, right, privilege, or immunity of a Federal nature was specially set up and claimed by the plaintiff in error and denied by the State courts. Rev. St., section 709."

Nor does the mere averment of the existence of Federal jurisdiction necessarily involve the attaching of that jurisdiction. Thus in Hamblin *vs.* Western Land Company (1892), 147 U. S., 531, this court, again speaking by MR. JUSTICE BREWER, said, on page 532:—

"It is doubtful whether there is a Federal question in this case. A real and not a fictitious Federal question is essential to the jurisdiction of this court over the judgments of State courts. Millingar *vs.* Hartupee, 6 Wall., 258; New Orleans *vs.* New Orleans Water Works Co., 142 U. S., 79, 87. In the latter case it was said that 'the bare averment of a Federal question is not in all cases sufficient. It must not be wholly without foundation. There must be at least color of ground for such averment, otherwise a Federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay.'"

Again, in New Orleans Water Works Company *vs.* Louisiana (1901), 185 U. S., 336, this court emphasized the same doctrine in an opinion by MR. JUSTICE PECKHAM, in the course of which it is said, at page 344:—

"It has long been the holding of this court that in order to warrant the exercise of jurisdiction over the judgments of State courts there must be something more than a mere claim that a Federal question exists. There must, in addition to the simple set-

> ting up of the claim, be some color therefor, or, in other words, the claim must be of such a character that its mere mention does not show it destitute of merit; there must be some fair ground for asserting its existence, and, in the absence thereof, a writ of error will be dismissed, although the claim of a Federal question was plainly set up. Thus in *Millingar vs.* Hartupee, 6 Wall., 258, the Chief Justice, at page 261, said: 'Something more than a bare assertion of such an authority seems essential to the jurisdiction of this court. The authority intended by the Act is one having a real existence, derived from competent governmental power.' This case arose under the twenty-fifth section of the Judiciary Act, and jurisdiction was sought to be maintained upon the assertion that the validity of an authority exercised under the United States was drawn in question, and the decision was against its validity. It was held not sufficient to make the claim, but there must be some color of foundation for its assertion."

After summarizing several of the important decisions on this point, MR. JUSTICE PECKHAM adds:—

> "These cases show the rule and its limitations, and where by the record it appears that although a claim of a Federal question had been plainly made, if it also clearly appear that it lacked all color of merit, and had no substance or foundation, the mere fact that it was raised is not sufficient to give this court jurisdiction."

And this view was reiterated in the very recent case of Sawyer *vs.* Piper (1903), to be reported in 189 U. S., 154, where a writ of error to the Supreme Court of Minnesota was dismissed without any consideration of the merits of the controversy in the State courts, on the single ground that it was obvious upon the face of the pleadings that no real Federal question was involved.

Applying these well-established principles to the facts of this case, it appears that the jurisdiction of this court

is invoked by the plaintiff in error to review a decision of the Supreme Court of Pennsylvania holding that a common carrier corporation chartered by the laws of that State may not set up as a defense a contract restricting its liabilities for damages as such common carrier, even when the freight for whose loss damages were claimed was *shipped into Pennsylvania from* a State where such contract would have been valid, on the ground that such a decision "is in conflict with the Act of Congress of February 4th, 1887, known as 'The Interstate Commerce Act.'"

To assert this claim is virtually to expose the error of the argument. The Act of February 4th, 1887 has long been clearly understood and its scope long ago clearly defined. It is, as its title indicates, "an Act to regulate commerce," and the substance of the provisions of its several sections as set forth in the marginal summary of each in the supplement to the Revised Statutes of the United States is to prohibit unreasonable charges for freight and passenger interstate transportation; to prohibit special rates and rebates; to prohibit undue preferences; to compel the furnishing of equal facilities to connecting lines of transportation; to prohibit pooling of rates; to prohibit combinations to prevent continuous carriage of freight to destination; to create a commission to enforce its provisions, and to regulate the workings and procedure of that commission, and further miscellaneous provisions. From first to last of the Act there is not a word which could possibly be transformed into a reference to contracts made by a carrier in restriction of liability for damages, or that there was any intention to legislate concerning them. Yet in the face of this fact the assertion is gravely put forth by the third assignment of error in the Pennsylvania Supreme Court, as quoted above, that—

> "Section 1 of said Act clearly provides that where the transportation is from one State to another, under a through bill of lading, that its provisions shall be

carried out unless it be in conflict with a statute of the State in which it may be performed or in conflict with the policy of the United States as laid down in the Federal courts."

Now let us put side by side with this a summary of the first section of the Act as stated in the margin of the Revised Statutes.

Paragraph I. provides to what sort of common carriers the Act shall be applicable.

Paragraph II. adds a proviso that no part of the Act shall be held to apply to any traffic wholly within one State.

Paragraph III. defines the terms "railroad" and "transportation" as used throughout the Act.

Paragraph IV. enacts that all charges made for transportation shall be reasonable and just.

Paragraph V. declares all unreasonable and unjust charges unlawful.

That is all of section I. of the Act of February 4th, 1887, which it is asserted with apparent seriousness is contravened by this decision of the Supreme Court of Pennsylvania declaring ineffectual any attempt of a common carrier under the well-settled law of the State to limit his liability for negligence to an agreed valuation beforehand.

It is submitted that such an assignment is so obvious an effort to manufacture a Federal question where none exists in order to secure a further review of a case already twice decided as to be without even the color of claim to consideration by this court.

Furthermore, as has already been noticed, even assuming that the assignment possessed any merit, it was raised too late. No suggestion was made of it in the trial court, and it was not considered in the Supreme Court of Pennsylvania except to be dismissed as undeserving of consideration.

In the case of Equitable Life Assurance Society *vs.* Brown (1902), 187 U. S., 308, brought to this court

by writ of error to the Supreme Court of the Territory of Hawaii, MR. JUSTICE WHITE, in delivering the opinion of this court, said on page 310:—

> "When the suit came to trial in the Hawaiian Court, no judgment having been rendered in the suit brought in New York, the defendant corporation, to support its contention that the plaintiff was not entitled to recover, claimed the benefit of the due faith and credit clause of the Constitution of the United States, and to sustain this asserted right offered proof of the appointment of the New York administrator and tendered an exemplification of the record of the proceedings had in the action, brought by the New York administrator in the Federal court in that State. The trial court rejected the evidence and exceptions were duly taken. A verdict was returned in favor of the plaintiff for the full amount sued for. The case having been taken to the Supreme Court of the Territory the judgment was affirmed, the court expressly deciding that the right asserted under the due faith and credit clause of the Constitution of the United States was without merit. From the foregoing it results that a claim under the Constitution and laws of the United States was made and decided in the court below, and if the fact that such a claim was formally made and disposed of below without reference to its substantial foundation determines the question of jurisdiction, the motion to dismiss must be denied. But it is settled that not every mere allegation of a Federal question will suffice to give jurisdiction. There must be a real substantive question on which the case may be made to turn, that is, a real and not a merely formal Federal question is essential to the jurisdiction of this court. Stated in another form, the doctrine thus declared is, that although, in considering a motion to dismiss, it be found that a question adequate abstractly considered to confer

jurisdiction was raised, if it likewise appear that such question is wholly formal, is so absolutely devoid of merit as to be frivolous, or has been so explicitly foreclosed by a decision or decisions of this court as to leave no room for real controversy, the motion to dismiss will prevail. New Orleans Water Works Co. *vs.* Louisiana, 185 U. S., 336, 345, and authorities there cited."

And in the case of San Jose Land and Water Company *vs.* San Jose Ranch Company (1902), 189 U. S., 177, it was said by MR. JUSTICE BROWN, in delivering this court's opinion, that while the record did not show any Federal right set up on the trial of the case, yet as the point had been raised in the Appellate Court of the State, and *fully considered by that tribunal*, it was sufficiently "specially set up and claimed" to be regularly before this court on a writ of error to the Supreme Court of California. In this case, the full and elaborate discussion of the alleged Federal question by the California Supreme Court need only be examined to see what is the meaning of the phrase "fully considered by that tribunal."

See also Onandaga Nation *vs.* Thacher (1902), 189 U. S., 306.

II. NOTHING IN THE RULE OF PENNSYLVANIA LAW APPLIED IN THIS CASE JUSTIFIES THE ASSUMPTION THAT IT INTERFERES WITH OR REGULATES INTERSTATE COMMERCE.

Before accepting as correct the argument of the appellant that the rule of Pennsylvania law applied in this case amounts to a regulation of or interference with interstate commerce it is necessary to understand clearly what the rule of law is and what were the facts to which it was applied. The appellant reads into the opinion of the Supreme Court of Pennsylvania several propositions of law which that opinion does not assert, and assumes several things as facts in the case which the opinion refuses to admit. Briefly and accurately stated, the rule of Pennsylvania law applied here is that the policy of

her laws prohibits a corporation created by her and transacting the business of a common carrier within her borders from limiting its liability for negligence by any form of contract, and that this rule will be applied by Pennsylvania courts to a contract made by a Pennsylvania corporation through an agent in another State. Obviously, therefore, no question can arise until a corporation created by her is charged in her courts with negligence occurring in Pennsylvania, when the defense interposed is a contract stipulating for some form of limited liability. What may be the law in other jurisdictions, even though the contract was made through the company's agent in an adjoining State, is an irrelevant matter, provided the contract is to be performed in Pennsylvania. The fact that the agent making the contract was another railroad company whose tracks are physically connected with those of the Pennsylvania corporation is equally unimportant, unless it can be shown that the contract of several different companies was entire and not severable. In the case at bar, no opinion was intimated as to how the Pennsylvania Supreme Court would deal with such an entire contract. The court did not overlook the fact that several different contracts for the carriage of goods by different railroads through more than one State might be called an interstate commerce transaction, and that the contract in this case was so called by the appellant. But the case as presented could not be treated as such a transaction until the appellant had shown that the contract was entire and not severable. The opinion shows just as plainly that the Pennsylvania Supreme Court was prepared to give full faith and credit to a contract valid in the State where made, even though the policy of the laws of that State differed from the policy of Pennsylvania law. Instances were cited in which the Pennsylvania Supreme Court had enforced a contract limiting the liability of a common carrier for negligence because made and performed in States where such limitation of liability was permitted. Pennsylvania distinctly refuses to allow her courts to be the resort of

citizens of other States who could not recover in their own courts on a cause of action arising under a different system of law. (Forepaugh *vs.* Delaware, &c., R. Co. (1889), 128 Pa., 217, 230; Fairchild *vs.* Philadelphia, &c., R. Co. (1892), 148 Pa., 527, as explained in the opinion of the Pennsylvania Supreme Court in the case at bar.)

The appellant urged in the State Supreme Court and insists here that the contract was entire. The Pennsylvania Supreme Court held to the contrary, saying:—

> "Careful consideration of the contract and of the evidence shows that the contract in this case was not entire, either as to the obligation of the carrier to transport or of the shipper to pay the freight. The New York Central Railroad made no contract for itself beyond its own lines; it acted as agent only for the connecting carrier. It is the same as though each carrier had separately agreed to transport over its own line, and the freight charges were shown to be made up of two distinct sums. One being the amount from Albany to Jersey City, and the other from Jersey City to Cynwyd."

It is clear, therefore, that the contract here involved was the ordinary form of a limited liability live-stock contract in common use among the railroads of this country. But while these railroads connect with each other and transport goods among different States under a common form of contract they have not yet reached the point in their business relations with each other of agreeing to assume any liability beyond their own lines or to make contracts for connecting railroads otherwise than as agent simply. They do this for their own protection and to avoid the very consequence of being charged with a liability caused by the negligence of some other carrier and arising, perhaps, out of the application of a different system of law from that which governs them. The appellant argues that because the agreements of the two corporations are included in one contract which provided for a continuous shipment over both railroads and across State

lines that this is an interstate commerce transaction. No one disputes that fact. What the appellee denies is the appellant's erroneous deductions of law from a correct statement of fact.

The first of these deductions is that because the United States Constitution gives Congress the power to regulate interstate commerce no state can adopt a rule of law such as was applied in the case at bar. The appellee admits without question that the power of Congress over this matter is supreme. Hence, that Congress might prescribe by law that every contract for the shipment of goods across state lines should be regarded as an entire contract, although made by several different railroads, and that a limitation of the carrier's liability like that made here should be deemed just and reasonable in the eyes of the law. Thus far, however, Congress has not seen fit to exercise its undoubted power in this way. Any one is at liberty to claim that it is unfortunate that Congress has not gone that far since the inevitable consequence must be that the laws of the several states will conflict, more or less, on such subjects.

The second erroneous deduction from the fact that this contract related to interstate commerce is that because Congress has passed the Interstate Commerce Act of 1887, and the general policy of that Act is to secure uniformity in certain matters the several states are bound so to mold their state law as to produce uniformity in matters which the Interstate Commerce Act does not attempt to regulate. It is submitted that what has been said on this subject, under an earlier section of this brief, shows that the act of Congress will be searched in vain for any such provision.

The third erroneous deduction from the fact that this contract related to interstate commerce is that because this court has laid down the rule of law applied in Hart *vs.* Pennsylvania R. R. Co. (1884), 112 U. S., 331, the Supreme Court of Pennsylvania was bound to follow that decision and apply that rule to the contract involved in the case at bar.

The appellant argues that the rule of Pennsylvania law applied in this case amounts to a regulation of or interference with interstate commerce. What has been said, however, shows that the rule of law is not what the appellant asserts it to be, and that the character of the contract in question was quite different from that upon which the appellant's argument is based. The Pennsylvania Supreme Court has declared it to be the policy of Pennsylvania law that a Pennsylvania common carrier shall not be permitted to contract against liability for its own negligence, even though such a contract is made for it by its agent in a state where such a contract would be valid. The question for the consideration of this court is, therefore, whether the state of Pennsylvania should be sustained in applying the rule of law thus limited to a contract like this. It is submitted that there can be only one answer to this question.

Nothing is better settled by repeated decisions of this court than the fact that the Federal power to regulate interstate commerce, however absolute and exclusive, is not a complete denial of the power of a state to control its own corporations engaged in interstate commerce. In spite of the Federal power, many state laws in the nature of police regulations of such corporations have been sustained, although it was admitted that such laws had an incidental effect upon interstate commerce. In at least one instance a state statute, distinctly prohibiting a corporation from exempting itself from liability as a common carrier by any form of contract, was sustained by this court as not amounting to a regulation of interstate commerce, and as within the power of the state to adopt, in spite of its incidental effect upon interstate commerce.

In Chicago, Milwaukee, &c., Ry. *vs.* Solan (1898), 169 U. S., 133, 136, this court interpreted the following provision of the Code of Iowa: "No contract, receipt, rule, or regulation shall exempt any corporation engaged in transporting persons or property by railway from liability of a common carrier, or carrier of passengers, which would

exist had no contract, receipt, rule, or regulation been made or entered into." The action was by a drover in charge of a herd of cattle, to recover for injuries to himself through the alleged negligence of the railroad company. The defense was that the drover had signed a contract, providing "that the company shall in no event be liable to the owner or person in charge of said stock for any injury to his person in any amount exceeding the sum of $500." The cattle were loaded at a town in Iowa for shipment to Chicago. The accident, causing the injury, occurred in Iowa, where the suit was brought. The company averred in its pleadings and offered to prove that in consideration of the above clause of the contract it had agreed to transport the cattle for a less sum than its regular usual charges, but such evidence was excluded at the trial. An essential part of the defense was that the contract related exclusively to interstate transportation, and constituted an interstate commerce transaction, and was a valid and legal contract at the common law; also, that the section of the Iowa Code above quoted was void and unconstitutional as an attempt to regulate and limit contracts relating to interstate commerce. A verdict for the plaintiff for $1000 was sustained both in the Supreme Court of Iowa and in this court. In the opinion of this court, by MR. JUSTICE GRAY, it was said:—

> "The question presented by this writ of error is whether the statute, as applied to a claim for an injury happening within the state, under a contract for interstate transportation, contravenes the provision of the Constitution of the United States empowering Congress to regulate interstate commerce.
>
> "This question is substantially answered by previous judgments of this court.
>
> "The question of the right of a railroad corporation to contract for exemption from liability for its own negligence is, indeed, like other questions affecting its liability as a common carrier of goods or passengers, one of those questions not of merely

local law, but of commercial law or general jurisprudence, upon which this court, in the absence of express statute regulating the subject, will exercise its own judgment, uncontrolled by the decisions of the state in which the cause of action arises. But the law to be applied is none the less the law of the state; and may be changed by its legislature, except so far as restrained by the constitution of the state, or by the constitution or laws of the United States. Railroad Company *vs.* Lockwood, 17 Wall., 357, 368; Hough *vs.* Railway Co., 100 U. S., 213, 226; Burgess *vs.* Seligman, 107 U. S., 20, 33; Myrick *vs.* Michigan Central Railroad, 107 U. S., 102, 109; Smith *vs.* Alabama, 124 U. S., 465, 476-478; Lake Shore, &c., Railway *vs.* Prentice, 147 U. S., 101, 106; Baltimore & Ohio Railroad *vs.* Baugh, 149 U. S., 368; Paine *vs.* Central Vermont Railroad, 118 U. S., 152, 161.

"Railroad corporations, like all other corporations and persons doing business within the territorial jurisdiction of a state, are subject to its law. It is in the law of the state that provisions are to be found concerning the rights and duties of common carriers of persons or of goods, and the measures by which injuries resulting from their failure to perform their obligations may be prevented or redressed. Persons traveling on interstate trains are as much entitled, while within a state, to the protection of that state as those who travel on domestic trains. A carrier exercising his calling within a particular state, although engaged in the business of interstate commerce, is answerable, according to the law of the state, for acts of nonfeasance or of misfeasance committed within its limits. If he fails to deliver goods to the proper consignee at the right time and place, or if by negligence in transportation he inflicts injury upon the person of a passenger brought from another state, the right of action for the consequent damage is given by the local law. It is equally within the power

of the state to prescribe the safeguards and precautions foreseen to be necessary and proper to prevent by anticipation those wrongs and injuries, which, after they have been inflicted, the state has the power to redress and to punish. The rules prescribed for the construction of railroads, and for their management and operation, designed to protect persons and property, otherwise endangered by their use, are strictly within the scope of the local law. They are not, in themselves, regulations of interstate commerce, although they control in some degree the conduct and the liability of those engaged in such commerce. So long as Congress has not legislated upon the particular subject, they are rather to be regarded as legislation in aid of such commerce, and as a rightful exercise of the police power of the state to regulate the relative rights and duties of all persons and corporations within its limits.

"Such are the grounds upon which it has been held to be within the power of the state to require the engineers and other persons, engaged in the driving or management of all railroad trains passing through the state, to submit to an examination by a local board as to their fitness for their positions; or to prescribe the mode of heating passenger cars in such trains. Smith *vs.* Alabama, 124 U. S., 465; Nashville, &c., Railway *vs.* Alabama, 128 U. S., 96; New York, New Haven & Hartford Railroad *vs.* New York, 165 U. S., 628. See also, Western Union Tel. Co. *vs.* James, 162 U. S., 650; Hennington *vs.* Georgia, 163 U. S., 299; Gladstone *vs.* Minnesota, 166 U. S., 427.

"The statute now in question, so far as it concerns liability for injuries happening within the state of Iowa—which is the only matter presented for decision in this case—clearly comes within the same principles. It is in no just sense a regulation of commerce. It does not undertake to impose any tax

upon the company, or to restrict the persons or things to be carried, or to regulate the rate of tolls, fares, or freight. Its whole object and effect are to make it more sure that railroad companies shall perform the duty resting upon them by virtue of their employment as common carriers, to use the utmost care and diligence in the transportation of passengers and goods."

The case just cited was affirmed in the following cases:—

Richmond, etc., R. Co. *vs.* Patterson Tobacco Co. (1898), 169 U. S., 311, 315;

Missouri, etc., Ry. Co. *vs.* Haber (1898), 169 U. S., 613, 627;

Calderon *vs.* Atlas Steamship Co. (1898), 170 U. S., 272, 282;

Lake Shore, etc., Ry. Co. *vs.* Ohio (1899), 173 U. S., 285, 296;

Cleveland, etc., Ry. Co. *vs.* Illinois (1900), 177 U. S., 514, 517.

In Richmond, etc., R. Co. *vs.* Patterson Tobacco Co. (1898), 169 U. S., 311, it was held, as stated in the syllabus, as follows: Section 1295 of the Virginia Code of 1887, enacting that "when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for its safe carriage to such point of destination, unless, at the time of such acceptance, such carrier be released or exempted from such liability by contract in writing signed by the owner or his agent; and, although there be such contract in writing, if such thing be lost or injured, such common carrier shall himself be liable therefor, unless within a reasonable time after demand made, he shall give satisfactory proof to the consignor that the loss or injury did not occur while the thing was in his charge," does not attempt to substantially regulate or control contracts as to interstate shipments, but simply establishes a rule of

evidence, ordaining the character of proof by which a carrier may show that, although it received goods for transportation beyond its own lines, nevertheless, by agreement, its liability was limited to its own line; and it does not conflict with the provisions of the Constitution of the United States touching interstate commerce. The court, in an opinion by MR. JUSTICE WHITE, said, on page 315:—

> "Of course, in a latitudinarian sense, any restriction as to the evidence of a contract relating to interstate commerce may be said to be a limitation on the contract itself. But this remote effect, resulting from the lawful exercise by a state of its power to determine the form in which contracts may be proven, does not amount to a regulation of interstate commerce. The principle on this subject has been often stated by this court, and, indeed, has been quite recently so fully reviewed and applied that further elaboration becomes unnecessary. In the case of Chicago, &c., Ry. Co. *vs.* Solan, 169 U. S., 133, 137-138, it was said, * * *"

In Cleveland, etc., Ry. Co. *vs.* Illinois (1899), 177 U. S., 514, 516, this court, in an opinion by MR. JUSTICE BROWN, said:—

> "Few classes of cases have become more common of recent years than those wherein the police power of the state over the vehicles of interstate commerce has been drawn in question. That such power exists and will be enforced, notwithstanding the constitutional authority of Congress to regulate such commerce, is evident from the large number of cases in which we have sustained the validity of local laws designed to secure the safety and comfort of passengers, employees, persons crossing railway tracks, and adjacent property owners, as well as other regulations intended for the public good.
>
> "We have recently applied this doctrine to state laws requiring locomotive engineers to be examined

and licensed by the state authorities, Smith *vs.* Alabama, 124 U. S., 465; requiring such engineers to be examined from time to time with respect to their ability to distinguish colors, Nashville, &c., Ry. *vs.* Alabama, 128 U. S., 96; requiring telegraph companies to receive dispatches, and transmit and deliver them with due diligence, as applied to messages from outside the state, Western Union Tel. Co. *vs.* James, 162 U. S., 650; forbidding the running of freight trains on Sunday, Hennington *vs.* Georgia, 163 U. S., 299; requiring railway companies to fix their rates annually for the transportation of passengers and freight, and also requiring them to post a printed copy of such rates at all their stations, Railway Company *vs.* Fuller, 17 Wall., 560; forbidding the consolidation of parallel or competing lines of railway, Louisville & Nashville Railroad *vs.* Kentucky, 161 U. S., 677; regulating the heating of passengers cars, and directing guards and guard posts to be placed on railroad bridges and trestles and the approaches thereto, N. Y., N. H., &c., Railroad Co. *vs.* New York, 165 U. S., 628; providing that no contract shall exempt any railroad corporation from the liability of a common carrier or a carrier of passengers, which would have existed if no contract had been made, Chicago, Milwaukee, &c., Railway *vs.* Solan, 169 U. S., 133; and declaring that when a common carrier accepts for transportation anything directed to a point of destination beyond the terminus of his own line or route, he shall be deemed thereby to assume an obligation for such carriage to such point of destination, unless at the time of such acceptance such carrier be released or exempted from such liability by contract in writing, signed by the owner or his agent, Richmond & Allegheny Railroad *vs.* Patterson Tobacco Co., 169 U. S., 311. In none of these cases was it thought that the regulations were unreasonable or operated in any just sense as a restriction upon interstate commerce."

Under the principles of these decisions it is clear that the rule of Pennsylvania law, applied in the decision of this case, could not possibly amount to an attempted interference with or regulation of interstate commerce.

III. THE ALLEGED RIGHT TO SUE OUT A WRIT OF ERROR IN THIS COURT DEPENDED UPON THE EXISTENCE OF A FEDERAL QUESTION, WHICH WAS DECIDED ADVERSELY TO THE APPELLANT BY THE PENNSYLVANIA SUPREME COURT. SINCE NO SUCH FEDERAL QUESTION AROSE IN THE CASE, THIS COURT WILL DECLINE TO INTERFERE WITH THE POLICY OF PENNSYLVANIA LAW AS DECLARED BY THE HIGHEST COURT OF THAT STATE.

Unless the appellant can show that a Federal question was involved in the decision of this case he has no standing in this court to sue out a writ of error. It would not be pretended that this court had jurisdiction unless a Federal question was involved and the Federal right claimed had been decided adversely to the appellant by the Pennsylvania Supreme Court. The so-called Federal question is the application of a rule of Pennsylvania law alleged to be an interference with or restriction upon interstate commerce. It has been shown, however, that no possible Federal question could arise out of the facts. The only contract which the Pennsylvania Supreme Court attempted to consider and pass upon was one by which the Pennsylvania Railroad Company agreed with the plaintiffs below to transport a valuable race horse from Weehawken, N. J., to Cynwyd, Pa. The consideration for the company's undertaking was to be the payment of an unknown freight charge upon the delivery of the horse at Cynwyd. This contract was drawn up and executed in Albany, N. Y., by agents for the respective principals. At the same time and in the same contract another railroad company, a corporation of New York, undertook to transport the horse from Albany to Weehawken, and there deliver him to the Pennsylvania Railroad Company. The latter contract stipulated carefully against liability for the negligence of a connecting car-

rier, and in terms declared that it made the contract as such connecting carrier's agent and on its behalf. The Pennsylvania Railroad Company did not deny the existence of a contractual relation thus created between it and the plaintiffs below. Nor did it deny that the cause of action arose through the negligence of its servants while transporting the horse from Philadelphia to Cynwyd, Pa. Under these circumstances the Pennsylvania courts refused to consider either the fact that a New York corporation was a party to a contract made at the same time which had been fully performed, or that the Pennsylvania Railroad also had agreed to transport the horse across New Jersey and had performed that part of its contract safely. The Pennsylvania courts did consider and pass upon that part of the contract of a Pennsylvania corporation which it had attempted to perform within the borders of the state, and had failed to comply with through the negligence of its own servants. In doing so they applied a rule of local law which declared that it was the settled legal policy of the state that none of its corporations engaged in the business of common carriers should be permitted to contract against liability for negligence; that this was such a contract, and was no less invaiid when made in a jurisdiction where such a contract would be held lawful, because while made elsewhere it was to be performed in Pennsylvania.

Let it be assumed for the sake of argument that the policy of the law established by the decisions of this court is in direct conflict on this question with the policy of Pennsylvania law. The appellant argues that when this fact is established this court will compel the Pennsylvania court to change the policy of the Pennsylvania law to conform with its opinion. The argument admits that this is a court of limited jurisdiction depending upon the existence of a Federal question, and assumes that a Federal question was involved here because the rule applied in the court below amounts to an interference with interstate commerce. But the decision of the Pennsylvania Supreme Court points out that it failed to see how

the facts before it involved any Federal question, and it repudiated any purpose to determine a question of interstate commerce. It claimed the right to decide what would be a lawful contract for one of its own corporations to make when that contract was to be performed within the limits of the state. It held that the same principle would govern if the contract was made by an agent of the corporation in a jurisdiction where a different system of law prevailed. What is there in all this to justify the claim that the rule of Pennsylvania law interferes with or restricts interstate commerce? It is suggested that the contract related to interstate transportation, and this is admitted; and that it was an entire contract, but this is disproved by mere examination of its terms; and that it was valid where made and hence must be valid everywhere, but this statement will be recognized at once as a misleading generalization of a rule of law of very limited application.

The question at issue, therefore, is not whether the policy of the law administered in this court agrees with that adopted in Pennsylvania, or which policy this court considers to be the better, but whether the facts of this case present such a Federal question as must exist to give jurisdiction and call for the expression of an opinion. It is submitted that the appellant only has succeeded in showing that a conflict exists in the policy of the law administered by two separate tribunals, each of which is supreme within its own sphere and has failed entirely in the effort to show that he has any standing in this court.

IV. THE APPELLANT CANNOT IMPORT A FEDERAL QUESTION INTO THE FACTS OF THIS CASE BY ARGUMENTS DRAWN FROM "THE COMMON LAW OF THE UNITED STATES" WHICH IS SAID TO PROMULGATE "THE PUBLIC POLICY OF THE UNITED STATES."

Failing to find a Federal question fairly arising out of the facts of this case and seasonably asserted in the state

courts, the appellant has been compelled to resort to an alleged body of law which is called "The Common Law of the United States," and which may be supposed to promulgate "The Public Policy of the United States." It is submitted that all that is said on these subjects merely tends to confusion of thought about matters that in themselves are entirely clear.

No one doubts that this court is the final arbiter in the decision of all questions involving Federal law; or that in the decision of many other controversies which come before it applies the local law of particular states as interpreted by the highest courts of such states; or that in a more limited class of cases involving principles of general as distinguished from state law it will be guided solely by its own opinion of what those principles are. A very superficial study of the decisions of this court will show how difficult many of these questions become under a system of government like ours. Relying upon some of the decisions discussing some of these difficulties the appellant deduces certain arguments founded upon the existence of a supposed common law of the United States as distinguished from the common law of the several states, and refers to the public policy of the United States. It is submitted that these arguments require little discussion.

It is said that under the common law of the United States the limitation of liability in this common carrier's contract must be held a just and reasonable modification of its old common-law liability because this court has so decided in Hart *vs.* The Pennsylvania R. R. Co. (1884), 112 U. S., 331. But this court only can apply the common law of the United States to the decision of cases within its appellate jurisdiction and properly brought before it. Recognizing that a Federal question must be the foundation of its jurisdiction the appellant finds the Federal question in a so-called public policy of the United States. That policy is said to require that interstate commerce shall be regulated by a uniform system of law, and that such a purpose on the part of Congress has

been manifested in the Interstate Commerce Act. In spite of the fact that this Act does not prescribe what shall be just and reasonable limitations of their old common-law liability in the contracts of common carriers the whole matter of interstate commerce must be regulated by the principles, either suggested in that Act or found in the common law of the United States. The appellant argues, therefore, that when this court once has decided that a limitation of liability like that attempted here is just and reasonable, every state court must follow this decision. But that decision was made in a case wherein the jurisdiction of this court was not in the slightest doubt. A like decision could not be made in the case at bar unless the jurisdiction of this court to decide this controversy first is established. This court cannot be expected to trace its jurisdiction from some vague system of common law of the United States. It must be found in a Federal question properly presented by the facts in issue. The Supreme Court of Pennsylvania has said that these facts did not involve any question of interstate commerce properly so called, and it is submitted that this decision was clearly right.

Moreover, the Supreme Court of Pennsylvania has respectfully asserted its right to an independent opinion upon the rule laid down in Hart *vs.* The Pennsylvania R. R. Co. (1884), 112 U. S., 331.

In Grogan *vs.* Adams Express Co. (1886), 114 Pa., 523, 528, the trial court following the decision in the Hart case charged the jury accordingly, and this was held to be error in the following language in the Supreme Court's opinion:—

> "In addition, however, to this the learned court further charged the jury that the defendant could limit its own liability, even as against its own negligence and had done so by the receipt given to the plaintiffs when the goods were shipped.
>
> "This was done in obedience to a decision of the Supreme Court of the United States, in the case of

Hart *vs.* The Penna. R. R. Co., 112 U. S. Rep., 331. An examination of that case shows that such is the law as declared by that court, and if the decision were of binding authority upon us we would be obliged to follow it. But our own decisions for a long time have established the opposite doctrine, until it has become firmly fixed in our system of jurisprudence. We could not depart from it now without overruling them all, and we are not willing to do so. The authorities upon the general subject are very numerous and conflicting. But with us the rule has been uniform and we prefer to adhere to it."

A. S. L. SHIELDS,
For Defendants in Error.